

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 SEAN FINN,

11 Defendant.

Case No. 2:13:cr-0439-KJD-VCF

ORDER


12 Before the Court is a Report and Recommendation (#477) prepared by Magistrate Judge
13 Ferenbach, which recommends denial of Defendant Sean Finn's Motion to Dismiss Counts Six
14 through Ten of his indictment (#447). Finn filed his objections to the Report and
15 Recommendation (#483), and the Government responded (#487). The Court has performed a de
16 novo review of the record in this case in accordance with 28 U.S.C. § 636(b)(1) and LR IB 3-2
17 and finds that Magistrate Judge Ferenbach's Report and Recommendation (#477) should be
18 ADOPTED and AFFIRMED.

19 Finn argues that the indictment did not adequately allege securities fraud. The argument
20 boils down to whether the investment agreements between the Malum Group and its alleged
21 victims are "securities." Whether an investment contract is a security depends on three factors.
22 The contract must devise a "transaction or scheme whereby a person [1] invests his money [2] in
23 a common enterprise and is led to expect profits solely from [3] the efforts of the promoter or a
24 third party." Warfield v. Alaniz, 569 F.3d 1015, 1020 (9th Cir. 2009). Finn only disputes the
25 third prong—that the agreements carried an expectation of profits produced by others. Obj. to
26 R&R 3, ECF No. 483. He claims that the agreements themselves only contemplated that the
27 parties to the agreement—not others—would produce the profits. And so, Finn argues, the
28 indictment is insufficient.

1 However, as both Magistrate Judge Ferenbach and the Government point out, whether an
2 investment contract qualifies as a security is generally a question for the jury. R&R 2, ECF No.
3 477; Govt. Resp. to Def.'s Obj. 3, ECF No. 487; see also United States v. Morse, 785 F.2d 771,
4 775–76 (9th Cir. 1986) (“the question whether a given investment opportunity constitutes a
5 security is ordinarily a question for the jury”). It is possible that Finn may prove at trial that the
6 investment contracts were not securities. However, at this stage in the prosecution, the Court will
7 not interpret these contracts, nor will it take that responsibility from the jury.

8 Accordingly, IT IS HEREBY ORDERED that the Magistrate Judge’s Report and
9 Recommendation (#477) is **ADOPTED** and **AFFIRMED**, and Defendant Sean Finn’s Motion to
10 Dismiss (#447) is **DENIED**.

11 Dated this 14th day of August, 2019.

A handwritten signature in black ink, appearing to read 'Kent J. Dawson', is written over a horizontal line.

Kent J. Dawson
United States District Judge